Supreme Court, U.S.
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No. 08-480

In The

Supreme Court of the United States

ALEXIS SICILIA,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a federal appellate court exercising diversity jurisdiction in a removed civil action for employment discrimination *which was brought solely under a state's civil rights statute* apply a federal or a state test for determining whether epilepsy constitutes a "handicap" or a "developmental disability"?

2. Should a federal appellate court exercising diversity jurisdiction in a removed civil action for employment discrimination *which was brought solely under a state's civil rights statute* apply a federal or state test for determining whether the former employer had in effect a seniority system which limited its statutory duty to "reasonably accommodate" a former employee's "handicap" or "developmental disability"?

3. Should a federal appellate court exercising diversity jurisdiction in a removed civil action for employment discrimination *which was brought solely under a state's civil rights statute* apply a federal or state test for determining whether the former employer has unlawfully retaliated against the former employee for having filed the lawsuit?

PARTIES TO THE PROCEEDING

The Petitioner is Alexis Sicilia, a resident and citizen of the State of Florida ("Sicilia"). The Respondent is United Parcel Service, Inc., a corporation which is organized under the laws of the State of Delaware ("UPS").

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The opinion of the Court of Appeals (Case No. 07-15077) is not reported in the Federal Reporter, Third Series. However, it can be found at 279 Fed. Appx. 936, 2008 WL 22 23051 and 20008 U.S. App. LEXIS 11698 and is reprinted at App. 1-7. The opinion of the District Court (Case No. 06-22848-Civ-Gold) is unreported and is reprinted at App. 8-38.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 2008. Sicilia's time in which to file this Petition for Writ of Certiorari has been extended until October 27, 2008 (Application No. 08A122). This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254(1).

THE STATUTES INVOLVED

1. Section 1652, Title 28, United States Code, is entitled "State laws as rules of decision" and provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

2. Section 760.02, Florida Statutes, is entitled "Definitions" and in pertinent part provides:

> For the purposes of ss. 760.01-760.11 and 509.092, the term:
>
> (1) "Florida Civil Rights Act of 1992" means ss. 760.01-760.11 and 509.092.
>
> * * *
>
> (4) "Discriminatory practice" means any practice made unlawful by the Florida Civil Rights Act of 1992.
>
> * * *
>
> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

3. Section 760.07, Florida Statutes, is entitled "Remedies for unlawful discrimination" and in pertinent part provides:

> Any violation of any Florida statute making unlawful discrimination because of . . . handicap . . . in the areas of . . . employment . . . gives rise to a cause of action for all relief and damages described in s. 760.11(5), unless greater damages are expressly provided for . . . The right to trial by jury is preserved in any case in which the plaintiff is seeking actual or punitive damages.

4. Section 760.10, Florida Statutes, is entitled "Unlawful employment practices" and in pertinent part provides:

> (1) It is an unlawful employment practice for an employer:
>
> > (a) To discharge or fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . handicap . . .
> >
> > (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities, or adversely affect any individual's status as an employee, because of such individual's . . . handicap . . .
>
> * * *
>
> (7) It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this section.

(8) Notwithstanding any other provision of this section, it is not an unlawful employment practice under ss. 760.01-760.10 for an employer . . . to:

> (a) Take or fail to take any action on the basis of . . . handicap . . . in those certain instances in which . . . absence of a particular handicap . . . is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.
>
> (b) Observe the terms of a bona fide seniority system . . . which is not designed, intended, or used to evade the purposes of ss. 760.01-760.10 . . . This subsection shall not be construed to make unlawful the rejection or termination of employment when the individual applicant or employee has failed to meet the bona fide requirements for the job or position sought or held or to require any changes . . . nor shall this act preclude such physical and medical examinations of applicants and employees as an employer may require of applicants and employees to determine fitness for the job or position sought or held.

5. Section 760.11, Florida Statutes, is entitled "Administrative and civil remedies; construction" and in pertinent part provides:

> (1) Any person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the [Florida Commission On Human Relations] within 365 days of the alleged violation, naming the employer . . . In lieu of filing the complaint with the [Florida Commission On Human Relations], a complaint under this section may be filed with the federal Equal Employment Opportunity Commission . . .
>
> * * *
>
> (5) In any civil action brought under this section, the court may issue an order prohibiting the discriminatory practice and providing affirmative relief from the effects of the practice, including back pay. The court may also award compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and any other intangible injuries, and punitive damages. The provisions of ss. 768.72 and 768.73 do not apply to this section. The judgment for the total amount of punitive damages awarded under this section to an aggrieved person shall not exceed $100,000. In any action or proceeding under this subsection, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be

> interpreted in a manner consistent with federal case law involving a Title VII action. The right to trial by jury is preserved in any such private right of action in which the aggrieved person is seeking compensatory or punitive damages, and any party may demand a trial by jury . . .

6. Section 385.207, Florida Statutes, is entitled "Care and assistance of persons with epilepsy; establishment of programs in epilepsy control" and in pertinent part provides:

> (1) The Legislature finds and intends that epilepsy is recognized as a developmental disability and a handicapping condition. The Legislature further intends that persons with epilepsy are entitled to the protection and benefits available to all persons through the equal and nondiscriminatory application and implementation of statutes, rules, programs, and services.

7. Section 25.031, Florida Statutes, is entitled "Supreme Court authorized to receive and answer certificates as to state law from federal appellate courts" and provides:

> The Supreme Court of this state may, by rule of court, provide that, when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are

> determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law, which certificate the Supreme Court of this state, by written opinion, may answer.[1]

STATEMENT OF THE CASE

Sicilia, on November 7, 2006, brought suit for damages in excess of $15,000.00 against UPS, in the General Jurisdiction Division, Eleventh Circuit Court, Miami-Dade County, Florida. In his complaint to the Florida State Court, Sicilia demanded trial by jury and alleged that UPS, his employer, had violated the Florida Civil Rights Act, §§ 760.01-760.11, Florida Statutes ("the FCRA"), by discriminatorily suspending him from full-time employment on the basis of his handicap – epilepsy. The Florida State Court assigned Case No. 06-23692 (CA 31) to Sicilia's civil action.

Invoking 28 U.S.C. § 1332, diversity of citizenship, on November 21, 2006, UPS removed Case No. 06-23692 (CA 31) to the U.S. District Court for the Southern District of Florida, which assigned it Case

[1] Section 25.031, Florida Statutes, has been implemented by Rule 9.150, Florida Rules of Appellate Procedure.

No. 06-22848-Civ-Gold/Turnoff. Simultaneously with its removal of Case No. 06-23692 (CA 31), UPS moved to dismiss Sicilia's complaint for failure to state a claim upon which relief could be granted. Sicilia responded in opposition to UPS's dismissal motion on December 6, 2006, and UPS filed a reply on December 13, 2006.

The District Court, on March 9, 2007, entered an order directing the parties to brief the question whether subject-matter jurisdiction existed in light of Sicilia's demand for damages in excess of $15,000.00 (the jurisdictional threshold for a Florida Circuit Court), not the $75,000.00 specified by 28 U.S.C. § 1332.

Sicilia filed a First Amended Complaint on March 12, 2007, in which he:

> (1) prayed for compensatory damages in excess of $75,000.00;
>
> (2) alleged that he had been discriminatorily suspended and terminated from his employment with UPS on the basis of his "handicap" (epilepsy); and
>
> (3) charged that UPS had terminated him in unlawful retaliation for his filing of Case No. 06-23692 (CA 31).

UPS answered Sicilia's First Amended Complaint on March 23, 2007. In that pleading, UPS denied that it had violated the FCRA and interposed several affirmative defenses.

On June 29, 2007, UPS moved for summary judgment of dismissal. In that motion, UPS contended that:

> (1) Sicilia was not "handicapped" within the meaning of the FCRA;
>
> (2) even if Sicilia were deemed to be "handicapped" within the meaning of the FCRA, UPS had reasonably accommodated his "handicap" by offering him part-time employment; and
>
> (3) Sicilia had failed to establish a causal connection between his filing of Case No. 06-23692 (CA 31) and the termination of his employment.

The District Court, on July 5, 2007, entered an order scheduling an oral argument on UPS's summary judgment motion. Sicilia, on July 17, 2007, responded in opposition to the UPS summary judgment motion. UPS, on July 20, 2007, filed a reply in support of its motion for summary judgment.

Sicilia and UPS, on September 12, 2007, filed a Joint Pre-Trial Stipulation. On September 20, 2007, Sicilia moved for leave to file a supplemental memorandum of law in opposition to UPS's motion for summary judgment. In his September 20, 2007, motion, Sicilia cited § 385.207(1), Florida Statutes, which provides:

> The Legislature finds and intends that epilepsy is recognized as a developmental *disability* and a *handicapping* condition. The

> Legislature further intends that persons with epilepsy are entitled to the protection and benefits available to all persons through the equal and nondiscriminatory application and implementation of *statutes*, rules, programs, and services. (Emphasis supplied)

UPS, on September 26, 2007, filed a memorandum of law opposing Sicilia's September 20, 2007, motion. The District Court, on September 27, 2007, granted Sicilia's September 20, 2007, motion. Sicilia, on September 30, 2007, filed a supplemental memorandum of law opposing UPS's summary judgment motion, in which he argued that, by virtue of § 385.207(1), Florida Statutes, as a matter of law he was "handicapped" within the meaning of the FCRA.

The District Court, on October 5, 2007, issued an order which made no mention of § 385.207(1), Florida Statutes, and, granting UPS's motion for summary judgment, determined that:

> (1) in accordance with the decision in *Carlson v. Liberty Mutual Insurance Co.*, 237 Fed. Appx. 446, 2007 WL 1632267, 2007 U.S. App. LEXIS 13551 (11th Cir. Case No. 06-15417, June 7, 2007), the FCRA was to be interpreted in the same manner as the Americans With Disabilities Act, under which Sicilia, an epileptic, was not "handicapped" because he had not suffered an impairment limiting one or more of his major life activities;

> (2) assuming, for the sake of argument, that Sicilia was handicapped for purposes of the FCRA, UPS had discharged its "reasonable accommodation" obligation by offering Sicilia part-time employment; and
>
> (3) UPS's termination of Sicilia's employment had not been in retaliation for his filing of Case No. 06-23692 (CA 31).

Simultaneously, the District Court entered final judgment for UPS. Sicilia's notice of appeal was filed on October 23, 2007.

Without hearing oral argument, the Court of Appeals, on May 30, 2008, affirmed the District Court's final judgment for UPS.

In its *per curiam* opinion, the Eleventh Circuit addressed Sicilia's § 385.207(1), Florida Statutes, contention as follows:

> On appeal, Sicilia argues that the district court erred when it failed to construe the FCRA with Fla. Stat. § 385.207(1) in making its handicap determination. Sicilia posits that section 385.207(1) gives a particularized definition of "handicap" for FCRA purposes. We review a district court's grant of summary judgment *de novo*; and we view the evidence and all reasonable factual inferences in the light most favorable to the nonmoving party. *Maniccia v. Brown*, 171 F. 3d 1364, 1367 (11th Cir. 1999).

Disability determination claims raised under the FCRA are analyzed under the same framework as the Americans With Disabilities Act ("ADA"). *Greenberg v. Bellsouth Telecomms., Inc.*, 498 F. 3d 1258, 1263-64 (11th Cir. 2007).[3] And a plaintiff qualifies as disabled under the ADA if, in pertinent part, he has a physical or mental impairment that substantially limits a major life activity. 42 U.S.C. § 12102(2)(A).

> [3] To establish a *prima facie* case of disability discrimination under the ADA, a plaintiff must show that (1) he has a disability; (2) he is a qualified person, and (3) his employer unlawfully discriminated against him because of his disability. *Reed v. Heil Co.*, 206 F. 3d 1055, 1061 (11th Cir. 2000).

Sicilia's epilepsy does not substantially limit him in a major life activity. By his own admission, his seizures are infrequent, not severe, and controlled with medication; he can tell when he is going to have a seizure and does not lose consciousness during one. *See generally Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (if a plaintiff's impairment is corrected by medication or other measures, he does not have an impairment that presently substantially limits a major life activity). In addition, he lost no work time because of the two seizures he suffered.

> Even with the doctor-imposed restrictions, Sicilia still can perform certain jobs. *See id.* at 2151 ("when the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that" a plaintiff allege he is unable to work in a broad class of jobs); *see also* 29 C.F.R. § 1630.2(j)(3)(*i*) (inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working").[4]
>
> [4] We reject Sicilia's argument that the district court erred in applying the ADA framework instead of construing the FCRA in conjunction with section 385.207(1). Section 385.207(1) directs the Department of Health to establish programs for the medical care and assistance of persons with epilepsy; it is no civil rights statute. This statute is unrelated to the FCRA and is not required to be read in conjunction with it. In addition, both federal and state caselaw plainly mandate that disability claims under the FCRA be analyzed under the ADA.

App. 4-5.

Next, the Court of Appeals rejected Sicilia's "reasonable accommodation" argument:

> Sicilia also argues that UPS did not meet its burden in showing that they attempted to

> accommodate him reasonably. But because Sicilia did not qualify as disabled, UPS was not required to accommodate him. *See Earl v. Mervyns, Inc.*, 207 F. 3d 1361, 1365 (11th Cir. 2000) (employers must provide a reasonable accommodation only for employees with known disabilities. Even if Sicilia did qualify for an accommodation, UPS was not required to violate its own seniority system to accommodate him to the day-shift positions for which he applied. *See U.S. Airways, Inc. v. Barnett,* 535 U.S. 391 (2002) (explaining that it ordinarily will be unreasonable for an employer to violate its own seniority system to accommodate an otherwise qualified disabled person; Fla. Stat. § 760.10(8)(b). (Footnote omitted)[2]

App. 5-6.

Finally, the Eleventh Circuit disposed of Sicilia's "unlawful retaliation" claim as follows:

> We turn to Sicilia's retaliation claim. He alleged that UPS suspended and terminated him in retaliation for filing his administrative and civil complaints. Sicilia filed his charge of discrimination with the EEOC

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[2] During pre-trial discovery, UPS failed to produce a single document, internal or otherwise, to support its contention that Sicilia had been denied a transfer to the day shift due to the effects of a "bona fide seniority system." UPS established the existence of such a system to the satisfaction of the District Court and the Court of Appeals solely through the depositions of its Miami-based human resources employees.

after his employment was suspended and filed his state court complaint in November 2006. Soon after, UPS removed the state court action to federal court. In February 2007, UPS informed Sicilia that his employment would be terminated as of 3 March 2007. The district court concluded that no causal connection existed between his protective activities and his suspension and termination.

To establish a *prima facie* case of retaliation under the ADA, a plaintiff must show that (1) he engaged in statutorily protected expression, (2) he suffered an adverse employment action, and (3) the adverse action causally was related to the protected expression. *Higdon v. Jackson*, 393 F. 3d 1211, 1219 (11th Cir. 2004).[6] To establish a causal connection, a plaintiff must show that the decision-makers were aware of the protected conduct and that the protected activity and the adverse act were at least somewhat related and in close temporal proximity. *Id.* at 1220.

[6] Retaliation claims under the FCRA's anti-retaliation provision, section 760.10(7), are analyzed under the framework of Title VII. *See Harper v. Blockbuster Entm't Corp.*, 139 F. 3d 1385, 1387 (11th Cir. 1998). And we assess ADA retaliation claims under the same framework as Title VII retaliation claims. *Standard v. A.B.E.L. Servs., Inc.*

161 F. 3d 1318, 1328 (11th Cir. 1998).

Sicilia's retaliation claim is defeated because he can show no causal link between his suspension and termination and the filing of his EEOC charge and civil rights complaint. He was removed from his position before he filed his EEOC charge and state court complaint. *See Griffin v. GTE Fla., Inc.*, 182 F. 3d 1279, 1284 (11th Cir. 1999) (stating that the adverse act must follow the protected conduct). And the 4-month period between when he filed his state court complaint and when he was terminated is, by itself, insufficient to establish retaliation. *See Higdon*, 393 F. 3d at 1221 (stating that three-month interval between protected speech and adverse act is too long, standing alone, to establish an inference of retaliation). Sicilia has presented no other causation evidence. Therefore, the district court properly granted summary judgment to UPS on the retaliation claim.[3]

App. 6-7.

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[3] The Court of Appeals' rejection of Sicilia's retaliation claim institutionalizes a perverse incentive: through the device of a delayed termination of a previously suspended employee, an employer can insulate itself from liability under § 760.10(7), Florida Statutes.

REASON FOR GRANTING THE WRIT

Justice Brandeis' opinion for the Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78 (1938), declared:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general", be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts . . .

Since the *Erie* decision, the Court has held that, in diversity cases which do not implicate federal law, Federal Trial and Appellate Courts are bound to apply "substantive" state law, whether that law is expressed through statutes or the decisions of the highest state courts, and "procedural" federal law, whether that law is expressed through the United States Constitution, the United States Code, or the Federal Rules of Civil Procedure. *See Gasperini v. Center For Humanities, Inc.*, 518 U.S. 415, 426-428 (1996), and cases cited therein.

The Eleventh Circuit, proceeding under its diversity jurisdiction, has departed from this doctrine

by "federalizing" the FCRA's provisions (1) proscribing employment discrimination on the basis of an employee's "handicap," (2) requiring an employer to "reasonably accommodate" an employee's "handicap" and (3) prohibiting an employer from retaliating against an employee who invokes the FCRA. This unauthorized "federalization" of the FCRA has been accomplished by the Eleventh Circuit through the device of interpreting the FCRA as if its language is identical to that of the ADA.

In this diversity case, however, the Eleventh Circuit's "federalization" of the FCRA has gone beyond the (mis)treatment of that statute as being couched in language identical to that of the ADA. Indeed, the Eleventh Circuit, by judicial fiat, has abrogated the Florida Legislature's finding that epilepsy is a "developmental disability" and a "handicapping condition" entitling affected persons to "the protection and benefits available to all persons through the equal and nondiscriminatory application and implementation of *statutes*, rules, programs and services." § 385.207(1), Florida Statutes. (Emphasis supplied)[4]

Because the Eleventh Circuit's abrogation of § 385.207(1), Florida Statutes, in the context of a diversity action constitutes a direct challenge to the

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[4] The term "statutes," as employed in § 385.207(1), Florida Statutes, is broad enough to encompass the FCRA.

doctrine of *Erie Railroad Co. v. Tompkins, supra,* the Court should grant Sicilia a Writ of Certiorari.

At a minimum, the Eleventh Circuit should have accepted Sicilia's suggestion[5] that, in the absence of authoritative Florida State Supreme Court decisional guidance, all three (3) of his contentions under the FCRA should be certified to the Supreme Court of Florida pursuant § 25.031, Florida Statutes, and Rule 9.150, Florida Rules of Appellate Procedure.

In *Lehman Brothers v. Schein,* 416 U.S. 386 (1974), a diversity case which originated in the Southern District of New York, the Court observed:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.
>
> Here resort to it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in

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[5] Page 35, f. 4 of Sicilia's Brief to the Court of Appeals in Case No. 07-15077.

> matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.
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> * * *
>
> The judgment of the Court of Appeals is vacated and the cases are remanded so that that court may reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court pursuant to Rule 4.61 of the Florida Appellate Rules. (Footnotes omitted)

416 U.S. at 390-391.[6]

By granting Sicilia's petition for a Writ of Certiorari, the Court would hold open the door to the "non-federalized" adjudications of his claims under the FCRA and, by necessary extension, those of other persons now and potentially entitled to the protections thereof.

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[6] On remand, the Court of Appeals certified several questions to the Supreme Court of Florida, *Schein v. Chasen*, 519 F. 2d 453 (2nd Cir. 1975), the answers to which were provided by *Schein v. Chasen*, 313 So. 2d 739 (Fla. 1975).

CONCLUSION

The Court should grant the Writ of Certiorari.

Respectfully submitted,

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DATED: October 8, 2008

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-15077
Non-Argument Calendar

D.C. Docket No. 06-22848-CV-ASG

ALEXIS SICILIA,

Plaintiff-Appellant,

versus

UNITED PARCEL SERVICE, INC.,
a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 30, 2008)

Before EDMONDSON, Chief Judge, ANDERSON and HULL, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Alexis Sicilia appeals the grant of summary judgment in favor of his former employer United Parcel Service ("UPS"), in Sicilia's

suit claiming violations of the Florida Civil Rights Act ("FCRA"), Fla. Stat. § 760.10 *et seq.*[1] No reversible error has been shown; we affirm.

Sicilia started working at UPS in 1997, but never informed anyone there that he had been diagnosed with epilepsy until after he suffered his first seizure at work in February 2006. Sicilia then was working a night shift as an Export PM shift clerk.[2] The seizure lasted only a few minutes, and he returned to his normal work activities afterwards. At a later doctor's visit, Sicilia's doctor told him he likely was having breakthrough seizures because of noncompliance with his medication. Sicilia had a second seizure in April 2006, but again, he did not lose time from work because of it.

After the second seizure, Sicilia told his doctor that he thought the seizures were caused by working the night shift. The doctor recommended that Sicilia stop working the night shift. In June 2006, UPS sent Sicilia to another doctor for a "fitness for duty" evaluation to determine if he could continue working as an Export PM shift clerk. This doctor restricted

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[1] Sicilia originally filed his disability discrimination suit in Florida state court, but UPS removed it to federal court based on diversity of jurisdiction. *See* 28 U.S.C. §§ 1332(a), 1446. Sicilia then filed an amended complaint adding a claim for retaliation under the FCRA.

[2] In this position, it was essential that Sicilia be able to work nights and perform quality control functions.

Sicilia to working the day shift and having no quality control responsibilities.

Because of the doctor-imposed restrictions, UPS removed Sicilia from the Export PM shift clerk position in July 2006. Because no other positions were then available, UPS suspended his employment but continued to pay his benefits while he looked for another position. In August 2006, Sicilia requested a job-related accommodation; but Sicilia's doctor filled out the required medical forms and stated that Sicilia could perform all functions of his position. UPS, thus, concluded that Sicilia did not qualify for an accommodation. Still, UPS informed Sicilia of available positions. And Sicilia applied for two available day-shift positions. The positions were filled by equally-qualified employees who had worked for UPS longer than Sicilia, pursuant to UPS's length-of-service seniority system. Sicilia received UPS benefits for the seven months he was not working but eventually UPS terminated his employment.

In his complaint, Sicilia contended that his epilepsy diagnosis qualified him as "handicapped" under the FCRA. He alleged that UPS suspended and terminated him because of his epilepsy and failed to provide him with a reasonable accommodation. The district court concluded that UPS was entitled to summary judgment because Sicilia had not demonstrated that he was disabled under the FCRA and, thus, had failed to make a *prima facie* case of disability discrimination.

On appeal, Sicilia argues that the district court erred when it failed to construe the FCRA with Fla. Stat. § 385.207(1) in making its handicap determination. Sicilia posits that section 385.207(1) gives a particularized definition of "handicap" for FCRA purposes. We review a district court's grant of summary judgment *de novo*; and we view the evidence and all reasonable factual inferences in the light most favorable to the nonmoving party. *Maniccia v. Brown*, 171 F.3d 1364, 1367 (11th Cir. 1999).

Disability discrimination claims raised under the FCRA are analyzed under the same framework as the Americans With Disabilities Act ("ADA"). *Greenberg v. BellSouth Telecomm., Inc.*, 498 F.3d 1258, 1263-64 (11th Cir. 2007).[3] And a plaintiff qualifies as disabled under the ADA if, in pertinent part, he has a physical or mental impairment that substantially limits a major life activity. 42 U.S.C. § 12102(2)(A).

Sicilia's epilepsy does not substantially limit him in a major life activity. By his own admission, his seizures are infrequent, not severe, and controlled with medication; he can tell when he is going to have a seizure and does not lose consciousness during one. *See generally Sutton v. United Air Lines, Inc.*, 119 S.Ct. 2139, 2146-47 (1999) (if a plaintiff's impairment

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[3] To establish a *prima facie* case of disability discrimination under the ADA, a plaintiff must show that (1) he has a disability; (2) he is a qualified person; and (3) his employer unlawfully discriminated against him because of his disability. *Reed v. Heil Co.*, 206 F.3d 1055, 1061 (11th Cir. 2000).

is corrected by medication or other measures, he does not have an impairment that presently substantially limits a major life activity). In addition, he lost no work time because of the two seizures he suffered.

Even with the doctor-imposed restrictions, Sicilia still can perform certain jobs. *See id.* at 2151 ("when the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that" a plaintiff allege he is unable to work in a broad class of jobs); *see also* 29 C.F.R. § 1630.2(j)(3)(i) ("inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working").[4]

Sicilia also argues that UPS did not meet its burden in showing that they attempted to accommodate him reasonably. But because Sicilia did not qualify as disabled, UPS was not required to accommodate him. *See Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1365 (11th Cir. 2000) (employers must provide a reasonable accommodation only for employees with known disabilities). Even if Sicilia did qualify for an accommodation, UPS was not required to violate its

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[4] We reject Sicilia's argument that the district court erred in applying the ADA framework instead of construing the FCRA in conjunction with section 385.207(1). Section 385.207 directs the Department of Health to establish programs for the medical care and assistance of persons with epilepsy; it is no civil rights statute. This statute is unrelated to the FCRA and is not required to be read in conjunction with it. In addition, both federal and state caselaw plainly mandate that disability claims under the FCRA be analyzed under the ADA.

own seniority system to accommodate him to the day-shift positions for which he applied. *See U.S. Airways, Inc. v. Barnett,* 122 S.Ct. 1516, 1524 (2002) (explaining that it ordinarily will be unreasonable for an employer to violate its own seniority system to accommodate an otherwise qualified disabled person); Fla. Stat. § 760.10(8)(b).[5]

We turn to Sicilia's retaliation claim. He alleged that UPS suspended and terminated him in retaliation for filing his administrative and civil complaints. Sicilia filed his charge of discrimination with the EEOC after his employment was suspended and filed his state court complaint in November 2006. Soon after, UPS removed the state action to federal court. In February 2007, UPS informed Sicilia that his employment would be terminated as of 3 March 2007. The district court concluded that no causal connection existed between his protected activities and his suspension and termination.

To establish a *prima facie* case of retaliation under the ADA, a plaintiff must show that (1) he engaged in statutorily protected expression, (2) he suffered an adverse employment action, and (3) the adverse action causally was related to the protected expression. *Higdon v. Jackson,* 393 F.3d 1211, 1219

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[5] We decline to address Sicilia's appellate arguments that he was not required to prove discriminatory intent and that UPS regarded him as disabled: he raised these arguments for the first time in a reply brief. *See United States v. Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002).

(11th Cir. 2004).[6] To establish a causal connection, a plaintiff must show that the decision-makers were aware of the protected conduct and that the protected activity and the adverse act were at least somewhat related and in close temporal proximity. *Id.* at 1220.

Sicilia's retaliation claim is defeated because he can show no causal link between his suspension and termination and the filing of his EEOC charge and civil rights complaint. He was removed from his position before he filed his EEOC charge and state court complaint. *See Griffin v. GTE Fla., Inc.*, 182 F.3d 1279, 1284 (11th Cir. 1999) (stating that the adverse act must follow the protected conduct). And the 4-month period between when he filed his state court complaint and when he was terminated is, by itself, insufficient to establish retaliation *See Higdon*, 393 F.3d at 1221 (stating that three-month interval between protected speech and adverse act is too long, standing alone, to establish an inference of retaliation). Sicilia has presented no other causation evidence. Therefore, the district court properly granted summary judgment to UPS on the retaliation claim.

AFFIRMED.

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[6] Retaliation claims under the FCRA's anti-retaliation provision, section 760.10(7), are analyzed under the framework of Title VII. *See Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998). And we assess ADA retaliation claims under the same framework as Title VII retaliation claims. *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1328 (11th Cir. 1998).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 06-22848-CIV-GOLD/TURNOFF

ALEXIS SICILIA,

Plaintiff,

v.

UNITED PARCEL SERVICE, INC., ET AL.,

Defendant. /

CLOSED CIVIL CASE

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; CLOSING CASE

THIS CAUSE is before the Court on Defendant's Motion for Summary Judgment **[DE 28]** on both counts of Plaintiff's Amended Complaint: (1) Count I for Unlawful Suspension and Termination of Employment; and, (2) Count II for Discrimination and Retaliation. Although both counts arise under the Florida Civil Rights Act ("FCRA"), this Court has jurisdiction pursuant to 28 U.S.C. § 1332 based on the parties diversity of citizenship.

The parties have filed responses, replies, sur-replies, and sur-sur replies. Having reviewed the parties' arguments and the relevant case law, I conclude that oral argument is not necessary, and that summary judgment should be entered for Defendant United Parcel Service, Inc. ("Defendant" or "UPS").

I. Factual Background

Defendant filed its Statement of Undisputed Facts **[DE 29]** and several affidavits in support of its motion for summary judgment. Plaintiff has not filed affidavits or a statement refuting any of the facts set forth in Defendant's statement. Pursuant to U.S. Dist. Ct. S.D. Fla. Local Rule 7.5, "[a]ll material facts set forth in the movant's statement . . . [are] deemed admitted unless controverted by the opposing party's statement, provided that the Court finds that the movant's statement is supported by evidence in the record." I find the following relevant facts to be undisputed and supported by evidence in the record.

A. Plaintiff's Employment with UPS

Plaintiff Alexis Sicilia ("Sicila" or "Plaintiff") began working for UPS on October 21, 1997 as a document auditor. (Defendant's Statement of Undisputed Facts, DE 29 ¶ 1). During his tenure with UPS, Plaintiff worked in a number of positions, on a variety of shifts. (*Id.* ¶ 2.) As a document auditor, Plaintiff worked from 4:00 a.m. to 10:00 or 11:00 a.m. (*Id.* ¶ 3). UPS promoted Plaintiff to a Grade 6 Coordinator position two years after he began working at UPS, where he worked the same 4:00 a.m. to 10:00 or 11:00 a.m. shift. (*Id.* ¶ 4). After two and a half years in this position, UPS promoted Plaintiff to a part time supervisor position, where he worked from 3:30 a.m. to 11:00 a.m. (*Id.* ¶ 5). Plaintiff worked in this position until the end of 2005. (*Id.* ¶ 6).

From 1997, when Plaintiff first began working at UPS, to the end of 2005, Plaintiff never informed anyone at UPS that he was epileptic. (*Id.* ¶ 7). Furthermore, despite starting work at 3:00 a.m. or 4:00 a.m., Plaintiff never suffered any seizures at work. (*Id.* ¶ 8). At this time, Plaintiff was taking the drug Trileptal for his epilepsy. (*Id.* ¶ 9).

In January 2006, Plaintiff applied for and received a customer service position in the Import Department. (*Id.* ¶ 10). As a customer service representative, Plaintiff began work at 10:00 a.m., and worked an eight hour shift. (*Id.* ¶ 11). In February, Plaintiff's shift was adjusted for the "flower period," or Valentine's Day, and he began working an eight hour shift that started at 5:00 p.m. (*Id.* ¶ 12). Plaintiff was transferred to the Export Department in March of 2006, where he worked as an Export PM Shift Clerk, a full-time Administrative Assistant position. (*Id.* ¶ 13).

As an Export PM Shift Clerk, Plaintiff began work between 3:00 and 3:30 p.m., and worked for eight hours. (*Id.* ¶ 14). The essential job functions for the new Export PM shift position included, but were not limited to, the ability to work nights and perform quality control functions. (*Id.* ¶ 5).

B. Plaintiff's Epilepsy and Seizures at Work

Plaintiff was diagnosed with epilepsy in 1988, while he was in the Cuban military. (*Id.* ¶ 16). According to Plaintiff, he can often tell when he is

going to have a seizure and he is fully aware of his surroundings while he is having a seizure. (*Id.* ¶¶ 17-18). During a seizure, Plaintiff does not lose consciousness or control of his bladder. (*Id.* ¶ 19). Despite being epileptic, Plaintiff does not have any problems eating, walking, hearing, talking, thinking, working, caring for himself, performing manual tasks, or with his ability to learn. (*Id.* ¶ 20). Plaintiff's seizures only last a few minutes and Plaintiff can return to normal activities shortly thereafter. (*Id.* ¶ 21).

On February 2, 2006, after nearly nine years at UPS, Plaintiff suffered his first on the job seizure. (*Id.* ¶ 25). The seizure lasted for a short time, and Plaintiff did not have any lost time from work following the seizure. (*Id.* ¶ 27). Following this incident, Plaintiff, for the first time, informed someone at UPS that he was epileptic. (*Id.* ¶ 28).

Plaintiff currently takes Keppra and Tegretol twice a day to control his epilepsy. (*Id.* ¶ 22). Prior to being prescribed Tegretol, Plaintiff was taking Trileptal. (*Id.*). On February 7, 2006, Plaintiff was seen by his treating physician, Dr. Carols Ramirez-Mejia. (*Id.* ¶ 29). Dr. Ramirez-Mejia concluded that the Plaintiff was having break through seizures because of his non-compliance with his medication, which is one of the most common causes of people having break through seizures. (*Id.* ¶ 30). During that appointment, Plaintiff told Dr. Ramirez-Mejia that he had not been taking his medication as prescribed because it was too expensive. (*Id.* ¶ 31). Plaintiff asked Dr. Ramirez-Mejia to change his medication to Tegretol,

which was less expensive. (*Id.* ¶ 32). The doctor informed Plaintiff that Trileptal is a much better medication than Tegretol in controlling seizures. (*Id.* ¶ 24).

On April 21, 2006, Plaintiff suffered another seizure while on the job at UPS. (*Id.* ¶ 33). Maritza Diaz, Plaintiff's Division Manager, witnessed Plaintiff's seizure. (*Id.* ¶ 34). Plaintiff remained at work following this seizure, and did not lose any time from work. (*Id.* ¶ 35). Plaintiff returned to work as an Export PM Shift Clerk the very next day after his April seizure. (*Id.* ¶ 37).

C. Plaintiff's Physician-Imposed Restrictions

On May 19, 2006, Plaintiff visited Dr. Ramirez-Mejia and told him that he thought working the night shift was causing seizures. (*Id.* ¶ 38). Plaintiff asked Dr. Ramirez-Mejia to write him a note. (*Id.*). At the time of this visit, Dr. Ramirez-Mejia did not have any notes in his file indicating that Plaintiff's seizures were aggravated by sleep deprivation. (*Id.* ¶ 39). The records of Dr. Carrazana, Dr. Ramirez-Mejia's predecessor, indicated that Plaintiff had worked two jobs and went to school and remained seizure free. (*Id.* ¶ 40). In his deposition, Dr. Ramirez-Mejia opined that if Plaintiff slept 7-8 hours per night while working his shift from 3:30 to 11:30 p.m. and used his CPAP device, Plaintiff would not be sleep deprived. (*Id.*, n. 2).

On May 19, 2006, Dr. Ramirez-Mejia signed a note recommending that Plaintiff not work the night shift, and asked that Plaintiff's schedule be changed. (*Id.* ¶ 42). The note further stated that Plaintiff was instructed regarding restrictions to his driving, diving, practicing extreme sports, and in general avoiding any situations in which he exposes himself and others to injury as a result of his seizures. (*Id.* ¶ 43).

As of May 19, 2006, Plaintiff was working as an Export PM Shift Clerk from 3:00 or 3:30 p.m. to 11:00 or 11:30 p.m. at night. (*Id.* ¶ 44). The Export PM Shift Clerk position also required Plaintiff to perform quality control functions. (*Id.* ¶ 45). On June 27, 2006, UPS sent Plaintiff to a doctor for a fitness for duty evaluation in order to ascertain whether Plaintiff was able to work as an Export PM Shift Clerk. (*Id.* ¶ 46). Plaintiff provided Dr. Susan Diaz with the May 19, 2006 note from Dr. Ramirez-Mejia. (*Id.* ¶ 47).

Based on Dr. Ramirez-Mejia's note, Dr. Diaz placed Plaintiff on restrictions limiting Plaintiff to working the day shift and having no quality control responsibilities. (*Id.* ¶ 48). Maritza Diaz, Plaintiff's Division Manager, has testified that although she had no concerns regarding Plaintiff's work performance or his ability to work, UPS removed Plaintiff from his night job as an Export PM Shift Clerk in order to comply with the physician-imposed restrictions. (*Id.* ¶ 49-51).

Following Plaintiff's fitness for duty evaluation with Dr. Diaz, Plaintiff met with Human Resources supervisor, Sandra Pedroso-Smith, Joe Hoyas and Maritza Diaz. (*Id.* ¶ 52). Sandra Pedroso-Smith informed Plaintiff that he could not work in the Export PM Shift Clerk position until his doctor released him from his restrictions. (*Id.* ¶ 53). No one at the meeting said anything negative about Plaintiff's performance. (*Id.* ¶ 54). Since there were no positions available for Plaintiff at the time, Ms. Pedroso-Smith encouraged Plaintiff to apply for disability and family medical leave so that he would be on UPS approved leave while he searched for another position. (*Id.* ¶ 55-56).[1]

Plaintiff submitted an application for short term disability with UPS's vendor, Broadspire, in July of 2006. (*Id.* ¶ 59). Broadspire denied Plaintiff's application because of Plaintiff's failure to provide sufficient medical records. (*Id.* ¶ 60). Liberty Mutual, Plaintiff's workers' compensation insurance carrier, also denied Plaintiff's request for workers' compensation after determining that his epileptic seizures did not result in any work related injury. (*Id.* ¶ 61). Plaintiff did not submit an application for family medical leave. (*Id.* ¶ 62).

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[1] UPS has several types of leave available, which allows employees to continue receiving benefits for a given period of time while they are not working. (*Id.* ¶ 57). Those leaves include short-term disability, workers compensation leave, and family medical leave. (*Id.* ¶ 58).

D. UPS's Assessment of Plaintiff's Request for an Accommodation

On August 8, 2007, UPS received notification that Plaintiff requested a job-related accommodation. (*Id.* ¶ 63). On August 15, 2006, UPS sent a Request for Medical Information packet to Plaintiff, containing the job description for Plaintiff's position and medical forms to be completed by Plaintiff's physician in order to assess whether Plaintiff was disabled under the law and thus eligible for an accommodation. (*Id.* ¶ 64). UPS could not continue its assessment of Plaintiff's request for accommodation until it received the completed medical forms from Plaintiff's physician. (*Id.* ¶ 65). On August 29, 2006, UPS sent Plaintiff a letter asking that he return the Request for Medical Information by September 5, 2006. (*Id.* ¶ 67). On September 1, 2006, UPS sent Plaintiff another letter informing him that it still had not received the requested information. (*Id.* ¶ 68). On September 6, 2006, UPS sent a third letter requesting the medical information that was needed from Plaintiff's physician, and extending the deadline to September 11, 2006. (*Id.* ¶ 70). Dr. Ramirez-Mejia signed and completed the form on September 11, 2006. (*Id.* ¶ 71). UPS received the completed Request for Medical Information from Dr. Ramirez-Mejia on September 18, 2006. (*Id.* ¶ 72).

In the Request for Information, Dr. Ramirez-Mejia stated that Plaintiff had a tendency to have seizures if he was sleep deprived. (*Id.* ¶ 73). With respect to working, Dr. Ramirez-Mejia stated that

Plaintiff could perform all the functions of the job and with respect to other life activities, Plaintiff was not substantially limited in any major life activity. (*Id.* ¶ 74). When Ms. Pedroso-Smith received the completed Request for Medical Information packet, she forwarded it to Donna Morrison, UPS's Southeast Region Occupational Health Manager responsible for evaluating employee requests for job related accommodations. (*Id.* ¶¶ 75-76). Ms. Morrison reviewed the medical information provided by Plaintiff's physician and concluded that Plaintiff was not a qualified individual with a disability under the law, including the American with Disabilities Act ("ADA"). (*Id.* ¶ 77).

On September 25, 2006, Ms. Pedroso-Smith sent a letter to Plaintiff informing him that UPS was unable to conclude that he was eligible for reasonable accommodation pursuant to the ADA. (*Id.* ¶ 78). Subsequently, Ms. Pedroso-Smith received additional medical documents which were sent to counsel for UPS by Plaintiff's counsel. (*Id.* ¶ 79). Ms. Pedroso-Smith forwarded those documents to Ms. Morrison for her consideration. (*Id.* ¶ 80). After evaluating the additional records provided by Plaintiff's counsel, UPS determined that Plaintiff was not disabled, and thus was not eligible for a reasonable accommodation under the ADA. (*Id.* ¶ 81-82).

E. UPS's Efforts to Provide Plaintiff with a Position

UPS strongly encourages its Promotion from Within Policy. (*Id.*, n. 5). Therefore, all job opportunities are posted on a board in the employee break room. (*Id.*). The only posted day position in the break room between May and July of 2006 that Plaintiff was qualified for was an Export Tracing Clerk position. (*Id.* ¶¶ 85-86). On July 27, 2006, after UPS informed Plaintiff that he could no longer work as an Export PM Shift Clerk because it would violate his medical restrictions, Plaintiff submitted a letter of intent to Ms. Pedroso-Smith expressing his desire to obtain a full time position as an Export Tracing Clerk. (*Id.* ¶ 83). Plaintiff knew of the availability of this position because it had been posted in the employee break room at UPS. (*Id.* ¶ 84). Plaintiff's previous position as an Export PM Shift clerk was a Grade Six position. (*Id.* ¶ 87). The Export Tracing Clerk position Plaintiff sought a transfer to was also a Grade Six position. (*Id.* ¶ 88). Although UPS considered Plaintiff for the position, the Export Tracing Clerk position was filled by Patricia Maza-Aguilera, who was equally qualified for the position and who had been employed with UPS since 1991, six years longer than Plaintiff. (*Id.*, n. 6).[2]

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[2] For its administrative employees, UPS has a length of service policy similar to a seniority policy for its collective bargaining employees. (*Id.* ¶ 89). Pursuant to the policy, if an employee's skills and qualifications are equal, then the employee

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UPS continued to notify Plaintiff of any open positions. (*Id.* ¶ 94). On September 12, 2006, UPS sent Plaintiff a letter notifying him of two job openings. (*Id.* ¶ 95). In the letter, Ms. Pedroso-Smith asked Plaintiff to contact her if he was interested in either of the positions. (*Id.* ¶ 96). Plaintiff did not speak to anyone at UPS after he received this letter. (*Id.* ¶ 97). In his deposition, Plaintiff stated that he was not interested in these positions because they were both part-time positions. (*Id.* ¶ 98).

On January 5, 2007, UPS notified Plaintiff of a Full-Time IDIS Intermediate Billing Associate available position. (*Id.* ¶ 99). On February 22, 2007, UPS notified Plaintiff that the IDIS and Intermediate Billing Associate position was filled by Mayra Perez, who was equally qualified for the position and had been employed with UPS since 1993, four years longer than Plaintiff. (*Id.*, ¶ 101, n. 7).

F. Procedural History and Termination of Employment

On July 27, 2006, Plaintiff filed a Charge of Discrimination against UPS with the United States Equal Employment Opportunity Commission ("EEOC")

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with the longer length of service receives the position. (*Id.* ¶ 90). Having worked at UPS for 10 years, Plaintiff knew that under UPS's length of service policy, to be considered for a promotion, an employee had to have both the required skills and length of service. (*Id.* ¶¶ 91-92).

alleging a violation of the Americans with Disabilities Act ("ADA"). Specifically, Plaintiff alleged that Defendant failed to provide him with a reasonable accommodation: (1) when it failed to place him in a daytime shift in the Customer Service Department because a more senior employee also applied for that position; and, (2) when if failed to place him as an Export Tracing Clerk without an explanation. On September 6, 2006, Plaintiff amended his Charge of Discrimination to also assert a claim of employment discrimination under the FCRA.

Upon request by the Plaintiff, the EEOC issued a "Notice of Right to Sue" under Title VII and/or the ADA. On November 7, 2006, Plaintiff filed a two count complaint against UPS in the General Jurisdiction Division of the Eleventh Judicial Circuit in Miami-Dade County, Florida. Shortly thereafter, Defendant removed the Complaint based on diversity jurisdiction. On March 12, 2007, Plaintiff amended his complaint. The Amended Complaint sets forth a claim under the Florida Civil Rights Act ("FCRA") for unlawful and discriminatory suspension and termination of employment by UPS because of his handicap, i.e., epilepsy (Count I), and a claim for discrimination and retaliation under the FCRA (Count II).

On February 22, 2007, UPS notified Plaintiff that, as of March 3, 2007, his employment with UPS would be terminated. (*Id.* ¶ 105). During the seven months period covering the time he was removed from his position as an Export PM Shift Clerk until

the effective date of termination, Plaintiff continued to receive medical benefits from UPS. (*Id.* ¶ 102).

II. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court's focus in reviewing a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512; *Bishop v. Birmingham Police Dep't*, 361 F.3d 607, 609 (11th Cir. 2004).

The moving party bears the initial burden under Rule 56(c) of demonstrating the absence of a genuine issue of material fact. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). Once the moving party satisfies this burden, the burden shifts to the party opposing the motion to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Celotex v. Catrett*, 477 U.S. 317, 324 (1986). A factual dispute is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the non-moving party.

Anderson, 477 U.S. at 248; *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001).

In assessing whether the movant has met its burden, the court should view the evidence in the light most favorable to the party opposing the motion and should resolve all reasonable doubts about the facts in favor of the non-moving party. *Denney*, 247 F.3d at 1181. In determining whether to grant summary judgment, the court must remember that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson*, 477 U.S. at 255.

III. Analysis

A. Disability Discrimination under the Florida Civil Rights Act

Plaintiff alleges that Defendant violated the FCRA through the unlawful, discriminatory and involuntary suspension and termination of his employment because of his medical condition, epilepsy. Defendant responds that Plaintiff has failed to make a *prima facie* case under the act because he does not have a physical or mental impairment that substantially limits one or more of his major life activities. Furthermore, even assuming that Plaintiff has made a prima facie case, summary judgement is appropriate because Defendant has shown legitimate and justifiable non-discriminatory business reasons for suspending and terminating Plaintiff and Plaintiff

has failed to show pretext. As discussed more fully below, I agree with the Defendant that Plaintiff has failed to establish a *prima facie* case for discrimination disability under the FCRA.

1. *Prima Facie* Case of Violation of the Florida Civil Rights Act

The FCRA provides, in relevant parts, that:

> It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age handicap, or marital status.
>
> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

Fla. Stat. § 760.10(1)(a)-(b). The FCRA does not define the term handicap. Instead, in analyzing a disability discrimination claim under the FCRA, courts use the same framework as disability claims

brought under the ADA.[3] *Byrd v. BT Foods, Inc.*, 948 So. 2d 921 (Fla. 4th DCA 2007) ("As applied to discrimination based on a handicap, the FCRA is construed in conformity with the federal Americans with Disabilities Act."); *Wimberly v. Sec. Tech. Group, Inc.*, 866 So. 2d 146, 146 (Fla. 4th DCA 2004) ("Because Florida courts construe the FCRA in conformity with the ADA, a disability discrimination cause of action is analyzed under the ADA.") (citing *Tourville v. Securex, Inc.*, 769 So. 2d 491, 492 (Fla. 4th DCA 2000) and *McCaw Cellular Commc'ns of Fla., Inc., v. Kwiatek*, 763 So. 2d 1063, 1065 (Fla. 4th DCA 1999)); *Carlson v. Liberty Mut. Ins.*, No. 06-15417, 2007 WL 1632267, *1 (11th Cir. June 7, 2007) ("A disability discrimination claim brought under the FCRA is analyzed under the same framework as ADA claims.") (citing *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1224 n. 2 (11th Cir. 2005); *Albra v. Advan, Inc.*, 490 F.3d 826, 834 (11th Cir. 2007) (same); *Flors v. Am. Airlines*, 184 F. Supp. 2d 1287, 1290 (S.D. Fla. 2002) ("Florida courts apply the ADA framework for FCRA claims . . . ").[4]

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[3] The case is before this Court on diversity grounds; therefore, Florida substantive law applies to Plaintiffs' claims. *Nobs Chemical, U.S.A., Inc. v. Koppers Co.*, 616 F.2d 212, 214 (5th Cir. 1980) ("Under *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), a federal court must follow state law in a diversity case.").

[4] Plaintiff relies on *Kelley v. Bechtel Power Corp.*, 633 F. Supp. 927 (S.D. Fla. 1986) to argue that the federal definition of handicap does not apply in FCRA claims. While this Court's

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To establish a *prima facie* claim of disability discrimination under the ADA, and consequently under the FCRA, a plaintiff must show (1) he has a disability; (2) he is a qualified individual; and, (3) the employer unlawfully discriminated against him because of his disability. *Carlson*, 2007 WL 1632267 at *1. I will address each element in turn.

a. Plaintiff is Not Disabled under the ADA

The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." *Id.* (quoting 42 U.S.C. § 12102(2)); *Wimberly*, 866 So. 2d at 147 (same). To qualify as a disabled person, a person must either be completely unable to perform the activity, or significantly restricted as compared to an average person. *Wimberly* 866 So. 2d at 147. Factors considered to determine if a person is substantially limited include: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and, (3) the permanent or long term impact of or

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Kelley decision has persuasive value, it cannot replace the more recent and binding authority from Florida Appellate Courts and the Eleventh Circuit, cited above, that have held that the FCRA claims based on disability discrimination are analyzed under the ADA framework.

resulting from the impairment. *Id.* (citing 29 C.F.R. § 1630.2(j)(2)).

Major life activities ("MLAs") "are functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Carlson* 2007 WL 1632267 at *1 (quoting 29 C.F.R. § 1630.2(i)). With respect to working, 'substantially limits' requires that an individual's ability to perform either a class of jobs or a broad range of jobs in various classes is significantly restricted as compared to the average person having comparable training, skills, and abilities. *Id.* (citing 29 C.F.R. § 1630.2(j)(3)(I)). thus, an individual's inability "to perform a single, particular job, does not constitute a substantial limitation in the major life activity of working." *Id.*

In *Mont-Ros v. City of West Miami*, 111 F. Supp. 2d 1338, 1253-54 (S.D. Fla. 2000), I concluded that the plaintiff's inability to work the midnight shift as a result of physician-imposed restrictions due sleep apnea did not substantially limit the major life activity of working. *Id.*; *see also, Colwell v. Suffolk Police Dep't*, 158 F.3d 634, 644-45 (2d Cir. 1998) (That police officer's doctor imposed certain restrictions on his work schedule following his cerebral hemorrhage, including that he work days only and only indoors, that his overtime be limited to certain hours, that he not work late tours or rotating shifts, and that he avoid stress and confrontation, was insufficient to establish that he was significantly restricted in his ability to work at a class or broad

range of jobs and thus was "substantially limited" in major life activity of working and disabled under ADA); *Amos v. Wheelabrator Coal Serv., Inc.*, 47 F. Supp. 2d 798, 803 (N.D. Texas 1998) (because plaintiff could do a wide variety of jobs, including heavy labor, and because only his ability to do rotating shift work was impaired, plaintiff was not a disabled person entitled to recover under the ADA); *Williams v. City of Charlotte, N.C.*, 899 F. Supp. 1484 (W.D. N.C. 1995) (rejecting plaintiff's claim that her 'shift work sleep disorder' substantially interfered with her major life activity of working since the sleep disorder did not impose a "significant barrier to employment" at numerous non-night shift jobs).

Here, Defendant is entitled to summary judgment as to Count I of the Amended Complaint because Plaintiff has failed to demonstrate that he is a disabled person under the FCRA. It is undisputed that Plaintiff has been diagnosed with epilepsy since 1988, that Plaintiff's seizures only last a few minutes, and that Plaintiff can return to normal activities, including work, shortly after having a seizure. In fact, Plaintiff did not have any lost time from work following his two on the job seizures. While having a seizure, plaintiff is aware of his surroundings; he does not lose consciousness or control of his bladder. It is also undisputed that Plaintiff does not have any problems eating, walking, hearing, talking, thinking, working, caring for himself, performing manual tasks, or with his ability to learn. Moreover, Plaintiff can control his seizures through appropriate medication.

Plaintiff has not offered any evidence tending to show that his medical condition substantially limits a major life activity. Under the mistaken belief that the ADA framework does not apply to FCRA disability claims, Plaintiff does not even allege that his condition substantially limits a major life activity. Even construing Plaintiff's Amended Complaint to include a claim that the recognized major life activity of working has been substantially limited by his epilepsy, Plaintiff has not submitted any evidence to support this claim. Contrary to such assertions, the undisputed evidence shows that Plaintiff's only limitation is his inability to work during the evening and night hours. Plaintiff's physician, Dr. Ramirez-Mejia, has stated that with respect to working, Plaintiff can perform all the functions of the job and is not substantially limited in any major life activity. Plaintiff's inability to work the night shift does not constitute a substantial limitation in the major life activity of working. *Cf. Mont-Ros*, 111 F. Supp. 2d at 1354 ("The inability to work a certain shift, without more, is insufficient to constitute a disability.").[5] Therefore,

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[5] In his motion opposing summary judgment, Defendant argues that his medical condition classifies him as handicapped person under the FCRA and that Plaintiff violated the Act when it failed to make a reasonable accommodation. This argument is without merit. Even accepting Defendant's erroneous conclusion that he meets the disability requirement under the Act, UPS met his obligation to make reasonable accommodations when, as discussed more fully below, it offered plaintiff two part-time positions. *See* 42 U.S.C. § 12111(9)(B) (listing part-time or modified work schedules as a reasonable accommodation).

Plaintiff has failed to establish the first element of a prima facie case for disability discrimination.

b. Plaintiff is Not a Qualified Individual for the Export PM Shift Clerk Position

To prove that he is a qualified individual, a plaintiff must establish that he can perform the essential functions of the position with or without reasonable accommodations. *Carlson*, 2007 WL 1632267 at *2 (quoting 29 C.F.R. § 1630.2(m)). Courts must give consideration to an employer's judgment and the employer's written description for that job as to what functions are essential. *See* 42 U.S.C. § 12111(8)) ("[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description . . . , this description shall be considered evidence of the essential functions of the job."); *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347, 1362 (D. Fla. 1999) ("An employer's identification of a position's 'essential functions' must be given some deference under the ADA.").

An employer may be liable for failing to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability. *See* 42 U.S.C. § 12112(b)(5)(A); *see also Schwertfager*, 42 F. Supp. 2d at 1364 (citing *Morisky v. Broward County*, 80 F.3d 445, 447 (11th Cir. 1996)). Reasonable accommodations under the

Act include "job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position." 42 U.S.C. § 12111(9)(B). The Plaintiff has the burden of identifying an appropriate accommodation and of showing that the accommodation is reasonable. *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997). The employer is not under a duty to reasonably accommodate until the employee demands an accommodation. *Schwertfager*, 42 F. Supp. 2d at 1364. Moreover, "an employee is not entitled to his preferred accommodation, only one that is reasonable." *Id.*

If the employee satisfies his burden of proving that a reasonable accommodation exists, the employer may show that the requested accommodation imposes an under hardship. *Id.* More importantly, the Act "does not demand that employers give disabled employees priority in hiring and reassignment over non-disabled employees." *Id.* Employers are not required to eliminate the essential functions of the job, alter its existing policies or programs, or create a new position for the disabled individual. *See id.* ("[E]employers are obligated only to provide alternative employment opportunities reasonably available under the employer's existing policies."); *Brand v. Fla. Power Corp.*, 633 So. 2d 504, 512 (Fla. 1st DCA 1994) ("[T]he defendant is not required to make fundamental alterations in its program. Nor is it required to create a new job for the plaintiff.") (citations omitted).

The evidence in the record, along with all inferences in favor of Plaintiff, do not establish that Plaintiff is a qualified individual, with or without reasonable accommodations, for the Export PM Shift Clerk position from which he was removed and ultimately terminated. The description of this position states that essential functions include the ability to work nights, from 3:00 or 3:30 p.m. to 11:00 or 11:30 p.m., and to perform quality control functions. Plaintiff submitted a note from Dr. Mejia-Ramirez, dated May 19, 2007, stating that due to his medical condition, Plaintiff could not work the night shift. Because this position required that the employee work during the hours Plaintiff's physician restricted him from working, Plaintiff is not a qualified employee for the Export PM Shift Clerk position.

c. Plaintiff has Failed to Demonstrate Discriminatory Intent

To satisfy the third element, which requires a showing that the employer unlawfully discriminated against the plaintiff because of his disability, the plaintiff may rely on direct or circumstantial evidence of discriminatory intent. *Schwertfager*, 42 F. Supp. 2d at 1356. In the case, Plaintiff has failed to meet the third requirement of the ADA framework since he has not submitted any evidence, direct or circumstantial, of discriminatory intent. All Plaintiff has demonstrated is that he was removed and subsequently terminated from a position because of his physician-imposed restrictions.

Because plaintiff has failed to meet any of the requirements to establish *prima facie* case of disability discrimination under the ADA, and consequently the FCRA, summary judgement in favor of Defendant is entered as to Count I of the Amended Complaint. Concluding that Plaintiff has not met his burden of establishing a *prima facie* case under the FCRA is sufficient to grant summary judgement in favor of Defendant. Nonetheless, for purposes of a thorough discussion, I will address the question of whether Plaintiff has established that Defendant's non-discriminatory and legitimate business reasons are pretextual.

2. Whether Defendant's Advanced Non-Discriminatory, Legitimate Business Reasons are a Pretext

Once the plaintiff establishes a *prima facie* case of employment discrimination, the burden shifts to the defendant to produce legitimate, nondiscriminatory reason for the challenged employment decision. *Mont-Ros*, 111 F. Supp. 2d at 1349 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (U.S. 1973)). This burden of rebuttal "is merely one of production, not persuasion, and is exceedingly light." *Id.* at 1349-1350 (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (U.S. 1981) and *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 773 (11th Cir. 1982)). If the defendant meets this burden, plaintiff must prove that the advanced reason was a pretext; in other words, "plaintiff must establish both that the

proffered reason for the employment decision was false and that the real reason for the action was discrimination." *Id.* at 1350. A plaintiff may avoid summary judgment by either persuading the court that the employer was more likely motivated by a discriminatory reason or by showing that the employer's explanation is not credible. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997).

Even assuming that Plaintiff can establish a *prima facie* case, Defendant has articulated a legitimate non-discriminatory reason for plaintiff's removal from the Export PM Shift position and for not placing him in one of the two available full time positions Plaintiff was qualified to apply for. First, the record demonstrates that Plaintiff was removed from the position not because he was epileptic but because his physician stated that he could not work evening or night hours as the position required. As to making reasonable accommodations, although UPS was not obligated to make them since it had correctly concluded that Plaintiff is not disabled under the ADA, UPS informed Plaintiff of two full time positions and two part positions Plaintiff could apply for. Plaintiff was not hired for either of the full time positions because other individuals, equally qualified but with a longer length of service, were placed in those positions in accordance with Defendant's length of service policy. *Cf. Brand*, 633 So. 2d at 512 ("[T]he defendant is not required to make fundamental alterations in its program. Nor is it required to create a new job for the plaintiff.") (citations omitted).

The fact that Plaintiff did not apply for the part time positions does not render Plaintiff's attempt at accommodating Defendant irrelevant. The ADA specifically states that offering part-time or modified work schedules is a reasonable accommodation. Furthermore, Defendant was not obligated to offer Plaintiff his preferred accommodation of a full time position. *Cf. Schwertfager*, 42 F. Supp. 2d at 1364 ("[A]n employee is not entitled to his preferred accommodation, only one that is reasonable.").

In addition, Plaintiff has completely failed to show defendant's reason is pretextual. Therefore, Defendant is entitled to summary judgment as to Count I of the Amended Complaint.

B. Plaintiff's Claim of Unlawful Retaliatory Conduct

In Count II of the Amended Complaint, Plaintiff alleges that Defendant violated the FCRA when it terminated his employment in retaliation for Plaintiff's filing of administrative and judicial complaints against Defendant. Defendant responds that summary judgment is appropriate because the undisputed facts do not establish a causal connection between the statutory protected activity and the adverse employment action.

The FCRA makes in an "unlawful employment practice for an employer . . . to discriminate against any person . . . because that person has made a charge, testified, assisted, or participated in any

manner in an investigation, proceeding, or hearing under this section." Fla. Stat. § 760.10(7).

A *prima facie* case of retaliation requires that the Plaintiff prove, by a preponderance of the evidence: (1) that he engaged in a statutorily protected activity; (2) that an adverse employment action occurred; and, (3) that the adverse action was related to the protected activities. *Dar Dar v. Associated Outdoor Club, Inc.*, 201 Fed. Appx. 718, 721 (11th Cir. 2006).[6] Filing a charge with the EEOC and commencing a judicial action are statutorily protected activities. *See* Fla. Stat. § 760.10(7) (making it unlawful to retaliate against a person who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.").

In the Eleventh Circuit, an "adverse employment action" is a serious and material change in the terms, conditions, or privileges of employment. *Davis v. Town of Lake Park*, 245 F.3d 1232, 1240 (11th Cir. 2001). Moreover, "the employment action must be materially adverse as viewed by a reasonable person in the circumstances." *Id.* Material actions are those that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Ry. v. White*, ___

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[6] Since Florida has modeled the FCRA after Title VII, Florida courts apply Title VII case law to claims of unlawful retaliation brought under the FCRA. *Dar Dar*, 201 Fed. Appx. at 721 (applying Title VII case law to analyze a FCRA retaliation claim).

U.S. ___, 126 S. Ct. 2405, 2409, 165 L. Ed. 2d 345 (2006). Unlawful suspension or termination of employment is an adverse action. *See generally, Burlington*, 126 S. Ct. at 2417 ("[T]he jury's conclusion that the 37-day suspension without pay was materially adverse was a reasonable one."); *Dar Dar*, 201 Fed. Appx. at 723 n. 3 (upholding district court's finding that employee's termination was an adverse action under the FCRA).

The causal connection required between the protected activity and the adverse action is construed broadly. *Higdon v. Jackson*, 393 F.3d 1211, 1221 (11th Cir. 2004). Thus, "a plaintiff merely has to prove that the protected activity and the . . . [adverse] action are not completely unrelated." *Id.* (quoting *Olmstead v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998)). This element can be satisfied by providing sufficient evidence of knowledge of the protected activity and a close temporal proximity between this awareness and the adverse action. *Id.* In *Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001), the Supreme Court cited with approval decisions in which a three to four months period between the activity and the adverse action did not show a causal connection. *Higdon*, 393 F.3d at 1221. "If there is a substantial delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint of retaliation fails as a matter of law." *Id.* Additionally, the protected activity must precede the retaliatory action. *See Griffin v. GTE Fla., Inc.*, 182

F.3d 1279, 1284 (11th Cir. 1999) ("At a minimum, [Plaintiff] must show that the adverse act followed the protected conduct; this minimum proof stems from the important requirement that the employer was actually aware of the protected expression at the time it took adverse employment action.").

There can be no dispute that the filing of the discriminatory charge with the EEOC and the subsequent commencement of this action is protected activity under the FCRA. There is also no dispute that suspension and termination of employment are material adverse action. However, Defendant argues that summary judgement must be entered because Plaintiff has failed to establish a causal connection between the protected activities and his suspension and ultimate termination. I agree.

The undisputed time line of events is as follow:

1. May 19, 2006: Dr. Ramirez-Mejia signs a note recommending that Plaintiff not work the night shift.

2. June 27, 2006: Plaintiff visits Dr. Diaz for duty evaluation in order to ascertain whether Plaintiff was able to work as an Export PM Shift Clerk. Dr. Diaz recommends that Plaintiff not work the night shift.

3. July 27, 2006: Due to the physician imposed restrictions, Defendant suspends Plaintiff's employment but continues to pay for his group medical insurance coverage.

4. July 27, 2006: Plaintiff files an administrative charge of employment discrimination against Defendant with the EEOC.

5. November 1, 2006: EEOC issues a "right to sue" letter as requested by Plaintiff.

6. November 7, 2006: Plaintiff files the instant action in state court.

7. February 22, 2007: Defendant sends a letter of termination of employment, effective March 3, 2007. Along with termination, Defendant discontinues its payment of the employer-paid group medical insurance coverage.

As to the first adverse action, removal from the Export PM Shift Clerk, Plaintiff has not offered any evidence to establish a causal link. Furthermore, the undisputed time line establishes that Plaintiff filed his administrative charge of discrimination ***after*** he was removed from the position due to the restrictions imposed by his physician. Thus, plaintiff has failed to establish a causal connection between removal from the Export PM Shift Clerk and the filing of his administrative charge. *Cf. Griffin*, 182 F.3d at 1284 (stating that the adverse action must follow the protected conduct).

As to Plaintiff's termination, effective March 3, 2007, Plaintiff has not presented any evidence other than the four months temporal proximity. This substantial delay between the filing of this action and Plaintiff's termination, in the absence of any other evidence tending to show causation, fails to establish

a *prima facie* case for retaliation under the FCRA. *Cf. Higdon*, 393 F.3d at 1221 ("By itself, the three month period between the September 29 letter and the December 31 incident does not allow a reasonable inference of a causal relation between the protected expression and the adverse action.").

In addition, as discussed above, Defendant has established a non-discriminatory, legitimate business reason for removing Plaintiff from the position – Plaintiff's inability to work the required night shift – and Plaintiff has failed to demonstrate that this reason is a pretext. As to the decision to terminate Plaintiff's employment with UPS, Defendant has established that it's decision was based on the fact that for the seven month period covering the time Plaintiff was removed from the Export PM Shift Clerk position until his effective date of termination, Defendant continued to pay for Plaintiff's medical benefits despite Plaintiff's failure to obtain leave, such as short-term or workers compensation leave. Plaintiff has not shown that this non-discriminatory, legitimate business reason is a pretext.

Because Plaintiff has not established a *prima facie* case of retaliation under the FCRA, summary judgment as to Count II of the Amended Complaint is hereby entered in favor of Defendant.

IV. Conclusion

Being fully advised and having considered the pertinent portions of the record and applicable law, it is hereby

ORDERED and ADJUDGED:

1. Plaintiff's Motion for Summary Judgment as to all counts of the Amended Complaint **[DE 28]** is **GRANTED**.
2. All pending motions are **DENIED AS MOOT**.
3. All hearing dates are **CANCELLED**.
4. This case is **CLOSED**.

DONE AND ORDERED, in Chambers, in Miami, Florida, this 5 day of October 2007.

/s/ Alan S. Gold
THE HONORABLE
ALAN S. GOLD
UNITED STATES
DISTRICT JUDGE

cc:
United States Magistrate Judge William Turnoff
All Counsel of Record